

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

NO. 77-6075

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Plaintiff-Appellant,

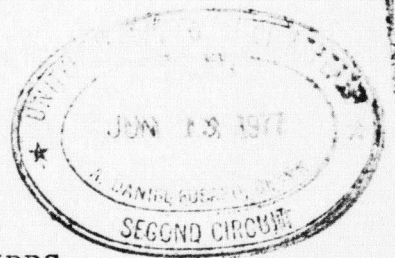
v.

COMMITTEE OF INTERNS AND RESIDENTS, and
NEW YORK STATE LABOR RELATIONS BOARD,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE
NEW YORK STATE LABOR RELATIONS BOARD



NORBERT M. PHILLIPPS
General Counsel,
Attorney for Defendant-Appellee,
New York State Labor Relations Board
Two World Trade Center; 33rd Floor
New York, New York 10047

(212) 488-4554

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6075

NATIONAL LABOR RELATIONS BOARD,

Plaintiff-Appellant,

v.

COMMITTEE OF INTERNS AND RESIDENTS, AND
NEW YORK STATE LABOR RELATIONS BOARD,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE
NEW YORK STATE LABOR RELATIONS BOARD

STATEMENT

This brief is submitted on behalf of Defendant-Appellee, New York State Labor Relations Board (herein called State Board) in response to that of Plaintiff-Appellant, National Labor Relations Board (herein called National Board). The other Defendant-Appellee, Committee of Interns and Residents (herein called CIR) is also filing a brief.

The State Board has fully set forth its views regarding the issues in this action in 4 Memoranda and Orders, all captioned "Misericordia Hospital Medical Center, etc.," as follows:

1. Memorandum and Order dated July 14, 1976,
39 NYSLRB No. 32;
2. Order dated November 1, 1976,
Decision No. 14792;
3. Memorandum dated February 4, 1977,
40 NYSLRB No. 7;
4. Memorandum and Order dated May 6, 1977,
40 NYSLRB No. 26.

The State Board relies upon the views expressed in those documents, and reproduces them, for the convenience of the Court, as its brief upon this appeal.

The State Board will abide by, and comply with, the directives of the courts in these matters. If this Court, finding that there is no federal preemption in this instance, should affirm the judgment of the Court below, the State Board is ready and able to continue processing the cases pending before it, and any new ones which may be filed, as appears from its Memoranda and Orders set forth below.

MEMORANDUM

and

O R D E R

MISERICORDIA HOSPITAL MEDICAL CENTER, ETC.

39 NYSLRB NO. 32

Dated July 14, 1976

Committee of Interns and Residents, herein called Petitioner, filed its petition herein on April 20, 1976, amended May 10, pursuant to Section 705 of the New York State Labor Relations Act, herein called the Act, seeking certification as exclusive bargaining representative of the interns, residents, and fellows at Misericordia Hospital Medical Center and Fordham Hospital, its affiliate, herein called the Hospital.

During the Board's informal investigation, the Hospital questioned the jurisdiction of this Board in view of the National Labor Relations Board's jurisdiction over non-profit hospitals since August 25, 1974.^{1/} To support this Board's jurisdiction, Petitioner relies upon the National Board's decision of

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1. Public Law 93-360, 88 Stat. 395, amending Section 2(2) of the National Labor Relations Act, 29 U.S.C. Section 152(2), and making other related provisions regarding non-profit hospitals.

March 23, 1976 in Cedars-Sinai Medical Center^{2/} holding that interns, residents, and fellows are not "employees" within the meaning of Section 2(3) of the National Act.

The Board invited the parties, as well as interested employers, labor organizations and others in the hospital field, to file briefs upon this issue. In addition to those of the parties to this proceeding, briefs were filed on behalf of St. Clare's Hospital and Health Center, Albert Einstein College of Medicine, and Hospital Association of New York State and The Greater New York Hospital Association. All have been considered by this Board.^{3/}

It is undisputed that this Hospital,^{4/} like similar non-profit hospitals, is now subject to the jurisdiction of the National Board. Representation proceedings, such as that now before us under Section 705 of the State Act, are cognizable under Section 9 of the National Act.^{5/}

2. 223 NLRB No. 57, 91 LRRM 1398.

3. The Union had requested oral argument, which was scheduled by the Board. When an adjournment was sought because counsel for various hospitals were unavailable on the scheduled date, the Union withdrew its request.

4. On June 15th, upon the petition of the Hospital, the National Board issued an Advisory Opinion that it "would assert jurisdiction over the Employer's operations with respect to disputes cognizable under Sections 8, 9 and 10 of the [National] Act." (224 NLRB No. 126)

5. 29 U.S.C. Section 159.

In a similar representation proceeding, Cedars-Sinai Medical Center, above, the National Board held that interns, residents, and fellows are not "employees" within the meaning of Section 2(3) of the National Act.^{6/} This Board has found otherwise as to Section 701(3) of the State Act during the period that non-profit making hospitals were under its jurisdiction.^{7/}

The question of possible state jurisdiction here is certainly not free from doubt. Cogent arguments can be, and have been made on both sides of the issue.^{8/}

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6. The National Board has followed with several other decisions to the same effect. See, for example, St. Christopher's Hospital for Children, 223 NLRB No. 58; University of Chicago, 223 NLRB No. 154; St. Clare's Hospital, 223 NLRB No. 163; Buffalo General Hospital, 224 NLRB No. 17.
 7. Brooklyn Eye and Ear Hospital, 32 SLRB 65, 67-75; The Long Island College Hospital, 33 SLRB 161, 165-178; Bronx Eye Infirmary, Inc., 33 SLRB 245, 247-250; Wyckoff Heights Hospital, 34 SLRB 625, 627-631.
 8. Contrast the decisions of the United States Supreme Court in Bethlehem Steel Company v. N.Y.S.L.R.B., 330 U.S. 767; San Diego Building Trades Council v. Garmon, 359 U.S. 236 and Lodge 76 International Association of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Board, ___ U S ___, ___ L Ed 2d ___, 92 LRRM 2881 (6/25/76), all finding federal preemption, with its decisions in Ingres S.S. Co. v. Maritime Workers, 372 U.S. 24; Hanna Mining Co. v. District 2, Marine Engineers Beneficial Association, AFL-CIO, 382 U.S. 181 (cited with approval in Lodge 76, International Association of Machinists, etc., above, footnote 3 thereof); De Canas v. Bica, ___ U S ___, 47 L Ed 2d 43, 91 LRRM 2433 (2/25/76) all sustaining State jurisdiction.

On balance, we have concluded that further processing of this matter before this Board is not warranted at this time. Accordingly, we shall dismiss the petition.

O R D E R

By virtue of and pursuant to the power vested in the New York State Labor Relations Board by the New York State Labor Relations Act, it is hereby

ORDERED, that the amended petition filed herein on May 10, 1976, by the Committee of Interns and Residents be, and the same hereby is, dismissed.

O R D E R

MISERICORDIA HOSPITAL MEDICAL CENTER, ETC.

DECISION NO. 14792

Dated November 1, 1976

Upon the following papers herein:

<u>CASE NO.</u>		<u>DATED</u>
SE-49745	Memorandum And Order (39 SLRB No. 32)	July 14, 1976
SU-49810	Order (Decision No. 14721)	July 21, 1976
SU-49926	Charge filed	July 15, 1976
	Board letter of dismissal	August 17, 1976

<u>CASE NO.</u>		<u>DATED</u>
SU-49927	Charge filed	July 15, 1976
	Board letter of dismissal	August 17, 1976
SU-49928	Charge filed	July 15, 1976
	Board letter of dismissal	August 17, 1976
SU-50011	Charge filed	July 26, 1976
	Board letter of dismissal	August 25, 1976
	Judgments of	
	Honorable Abraham J. Gellinoff,	
	Justice of the Supreme Court,	
	County of New York, in the	
	Matters of the Application of	
	the Committee of Interns And	
	Residents -against- The New York	
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	Nos. 15928-76, 15929-76, 15930-76	
	and 15931-76, all entered in the	
	Office of the Clerk of the	
	said Court on.	October 22, 1976

AND, due deliberation having been had
upon the foregoing,

NOW, THEREFORE, by virtue of and pursuant
to the power vested in the New York State Labor
Relations Board by the New York State Labor Relations
Act, it is hereby

ORDERED, that the Orders of dismissal heretofore issued in Misericordia Hospital Medical Center And Fordham Hospital, Its Affiliate, Case No. SE-49745, (39 SLRB No. 32), on July 14, 1976, and Albert Einstein College of Medicine, Case No. SU-49810, (Dec. No. 14721), issued on July 21, 1976, be, and the same hereby are, vacated and set aside; and it is further

ORDERED, that the letters of dismissal in Beth Israel Medical Center, Case No. SU-49926, on August 17, 1976, Brookdale Hospital Medical Center, Case No. SU-49927, on August 17, 1976, Hospital For Joint Diseases And Medical Center, Case No. SU-49928, on August 17, 1976, and Long Island Jewish-Hillside Medical Center, Case No. SU-50011, on August 25, 1976, be, and the same hereby are, rescinded; and it is further

ORDERED, that the Board's processing of all these proceedings be, and the same hereby are, resumed.

M E M O R A N D U M

MISERICORDIA HOSPITAL MEDICAL CENTER, ETC.

40 NYSLRB NC. 7

Dated February 4, 1977

On July 14, 1976, the Board issued its Memorandum and Order in Misericordia Hospital Medical Center, etc., Case No. SE-49745, 39 SLRB No. 32, dismissing that proceeding for the following reasons:

"The question of possible state jurisdiction here is certainly not free from doubt. Cogent arguments can be, and have been made on both sides of the issue. On balance, we have concluded that further processing of this matter before this Board is not warranted at this time. Accordingly, we shall dismiss the petition."

The remaining proceedings set forth in the caption were subsequently dismissed for the same reason.

Thereafter, Committee of Interns and Residents, herein called the Committee, brought proceedings, in the Supreme Court of the State of New York, New York County, for judicial review of that determination. On October 14, 1976, Justice Abraham J. Gellinoff found that the National Labor Relations Act, as interpreted by the National Labor Relations Board,

"...does not...preempt the State Labor Relations Board from exercising jurisdiction with respect to the petitions made to it by petitioner...This Court... finds that the Board has, and should exercise, its jurisdiction."

The proceedings were remanded to the Board for further consideration.^{1/}

On November 1, 1976, the Board, in accordance with Justice Gellinoff's ruling, vacated, set aside and rescinded its prior dismissals of these proceedings, and ordered, "that the Board's processing of all these proceedings be, and the same hereby are, resumed." (Dec. No. 14792) No further action has been taken thereon in view of subsequent developments.

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1. Not officially reported, 176 NYLJ No. 75 (10/18/76), p. 11, 93 LRRM 2540.

Appeals from Justice Gellinoff's judgment, taken by various hospitals which had intervened in the court proceedings, were subsequently withdrawn.

Thereafter, Justice Gellinoff granted the motion of various hospitals to reargue, recalled and vacated his first decision, and dismissed the proceeding solely on the ground that State courts could not decide the preemption issue. Opinion of January 6, 1977, unreported; Opinion of January 20, 1977, noted in 177 NYLJ No. 17 (1/25/77) p. 6. An appeal by the Committee from this judgment is pending in the Appellate Division.

Thereafter, the National Labor Relations Board commenced a proceeding in the United States District Court, Southern District of New York, for an injunction to restrain the Committee from taking any further action before state tribunals to compel this Board to process these matters, and to restrain the Board from proceeding. On January 29, 1977, Judge Charles E. Stewart denied the National Board's application and granted the Committee's motion to dismiss the action. In his Opinion Judge Stewart held:

"Because of the NLRB's ruling that housestaff are not 'employees' under the NLRA, the labor relations of housestaff physicians are not subject to the provisions of the [National Labor Relations] Act and are not within the jurisdiction of the [National] Board. We conclude that the NLRA does not preempt the exercise of state power over the labor relations of housestaff because we find that there is no national labor policy which requires that housestaff be unregulated by all bodies of labor law and controlled only by the free play of economic forces."

In view of the holding of Judge Stewart that there is no federal preemption here, this Board, sua sponte, will adhere to its Order of November 1, 1976 (Dec. No. 14792) to resume the processing of these proceedings. However, no further action will be taken in any specific proceeding except upon application of one of the parties, and until the National Board's time to appeal from Judge Stewart's Order has expired or, if an appeal is filed, until final determination thereof.

MEMORANDUM

and

O R D E R

MISERICORDIA HOSPITAL MEDICAL CENTER, ETC.

40 NYSLRB NO. 26

Dated May 6, 1977

On March 30, 1977, Committee of Interns and Residents, herein called CIR, filed a motion with the Board, with supporting affidavit, for an order modifying this Board's Memorandum of February 4, 1977 (40 SLRB No. 7) and "directing that the processing of these proceedings be resumed immediately." All of the Hospitals named above submitted opposing papers. A statement was also received on behalf of the National Labor Relations Board. CIR filed a reply affidavit.

In the Memorandum referred to, the Board stated that it:

" . . . will adhere to its Order of November 1, 1976 (Dec. No. 14792) to resume the processing of these proceedings. However, no further action will be taken in any specific proceeding except upon application of one of the parties, and until the National Board's time to act from Judge Stewart's Order has expired or, if an appeal is filed, until final determination thereof."

That Memorandum was issued by the Board sua sponte, without the benefit of the views of the affected parties. Upon further consideration, the Board has concluded that the public interest will best be served by resuming the processing of these proceedings at this time.

No stay or injunction is in force restraining the Board from proceeding with these matters.^{1/} Indeed, the United States District Court, Judge Charles E. Stewart, denied the application of the National Board for a temporary injunction and dismissed its complaint seeking a permanent injunction. Yet, the effect of further abstention by this Board would be to grant the very relief sought from, and denied by, that Court.

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1. On November 18, 1976, upon the appeals by certain of the Hospitals from Justice Gellinoff's determination of October 14, 1976, the Appellate Division, 1st Dept., issued an order staying the proceeding before this Board "pending hearing and determination of the . . . appeals..." This Board was never served with a copy, or otherwise formally notified, of that order. Nor had it been notified of the original application to the Court for the stay. (Cf. CPLR Sections 6311 (2), 6313(a) and 7805.) In any event, the stay is no longer in effect because in January, 1977, Justice Gellinoff withdrew his earlier judgment from which the appeals were taken, and the appeals were thereupon withdrawn.

In its original Memorandum and Order of July 14, 1976 (39 SLRB NO. 32) this Board recognized that the question of federal preemption "is certainly not free from doubt." It concluded that further processing was "not warranted at this time." Since then, the 2 courts which have considered the preemption issue on the merits each concluded that the action of the National Board in dismissing the petitions filed with it on behalf of housestaff has not preempted the jurisdiction of the State Board.^{2/}

Further delay in processing these matters by this Board, absent a court order so requiring, could be of irreparable harm to the affected housestaff and the CIR. For example, it is well known that the more time that elapses before an election is conducted, the less is the likelihood that the labor organization will be selected as bargaining representative.^{3/}

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2. In his second decision Justice Gellinoff held that the preemption issue should be decided by the federal courts. The United States District Court has now spoken.
 3. Cf. N.L.R.B. v. Gissel Packing Co., Inc., 395 U.S. 576, 610-611.

By contrast, no legal harm would befall the Hospitals through a continuation of these proceedings. Participation in hearings, elections and other proceedings before the Board does not constitute "irreparable injury."^{4/} Nor will the Hospitals be affected by any determinations made by the Board prior to, and including, any final orders which may issue in unfair labor practice proceedings. The latter are, in turn, subject to judicial review on all issues, including jurisdiction, prior to enforcement by the Courts.^{5/}

For the foregoing reasons, we shall resume the processing of the captioned proceedings at the various stages at which they are now pending. Appropriate notices of hearings, as the situation requires, will issue in each proceeding in due course.

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4. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-52; Norris, Inc. v. N.L.R.B., 177 F. 2d 26, 27-28; Almeida Bus Lines, Inc. v. Curran, 209 F. 2d 680, 684.
 5. Sections 706 and 707 of the Act. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41. 48-50.

[SAME CAPTION] No. 77-6075

CERTIFICATE OF SERVICE

Three copies of Defendant-Appellee,
New York State Labor Relations Board's brief were
served by first class mail, postage prepaid, this
13th day of June, 1977, upon each of the following counsel:

Carl L. Taylor, Esq.
Associate General Counsel
Attorney for Plaintiff-Appellant,
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Edwin H. Bennett, Esq.
Regional Attorney, Region 2
Attorney for Plaintiff-Appellant
National Labor Relations Board
36th Floor - Federal Building
26 Federal Plaza
New York, New York 10007

Murray A. Gordon, P.C.
Attorney for Defendant-Appellee,
Committee of Interns and Residents,
666 Third Avenue
New York, N. Y. 10017

and upon the following counsel for each of the
amici curiae:

Stanley N. Futterman, Esq.
Poletti Freidin Prashker Feldman & Gartner
1185 Avenue of the Americas
New York, N. Y. 10036

Gerald Bodner, Esq.
Winer, Neuburger & Sive, Esqs.
425 Park Avenue
New York, N. Y. 10022

Robert Scher, Esq.
Raphael Searles Vischi Scher Glover
& D'Elia, Esqs.
770 Lexington Avenue
New York, N. Y. 10021

Robert E. Smith, Esq.
Guggenheimer & Untermeyer, Esqs.
80 Pine Street
New York, N. Y. 10005

Kenneth Harfenist, Esq.
600 East 233rd Street
Bronx, N. Y. 10466

Proskauer Rose Goetz & Mendelsohn, Esqs.
300 Park Avenue
New York, N. Y. 10022

Carl Wm. Vogt, Esq.
Fulbright & Jaworski, Esq.
1150 Connecticut Avenue, N.W.
Washington, D. C. 20036

Richard Epstein, Esq.
Sonnenschein Carlin Nath & Rosenthal, Esqs.
8000 Sears Tower
Chicago, Ill. 60606

Dated: at New York, N. Y.
This 13th day of June, 1977.

Norbert M. Phillipps

Norbert M. Phillipps, Esq.
General Counsel
Attorney for Defendant-Appellee
New York State Labor
Relations Board
Two World Trade Center, 33rd Floor
New York, New York 10047
(212) 488 - 4554